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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**
11

12 DAVID LEWIS,

13 Petitioner,

14 v.

15 JAMES A. YATES, Warden,

16 Respondent.
17

No. CV 08-7265-VAP (AGR)

OPINION AND ORDER ON PETITION
FOR WRIT OF HABEAS CORPUS

18 On November 3, 2008, Petitioner David Lewis, proceeding pro se, filed a Petition
19 for Writ of Habeas Corpus By a Person in State Custody ("Petition") pursuant to 28
20 U.S.C. § 2254 in this Court.

21 **I.**

22 **PROCEDURAL HISTORY**

23 Pursuant to Fed. R. Evid. 201, this Court takes judicial notice of the records in
24 two prior federal habeas corpus actions brought by Petitioner: *Lewis v. Borg*, CV 88-
25 4803 ER (S) ("Lewis I"); *Lewis v. Marshall*, CV 92-7212 ER (S) ("Lewis II").

26 Petitioner was convicted in 1986 of second degree murder with possession of a
27 firearm. On January 12, 1987, the California Court of Appeal affirmed the judgment.
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1 On July 13, 1988, the California Supreme Court denied a petition for writ of habeas
2 corpus.

3 In Lewis I, Petitioner filed a petition for writ of habeas corpus by a person in state
4 custody on August 8, 1988. Lewis I challenged Petitioner's 1986 convictions based on
5 two grounds: ineffective assistance of trial counsel and ineffective assistance of
6 appellate counsel. On June 30, 1989, the Court entered Judgment dismissing the
7 Petition on the merits with prejudice.

8 In Lewis II, Petitioner filed a second petition for writ of habeas corpus by a person
9 in state custody on December 7, 1992. Lewis II challenged Petitioner's 1986 conviction
10 on five grounds: trial court failed to give petitioner's instructions to the jury, prosecutor
11 misconduct and misleading jury instructions, trial court erred in sending the jury back to
12 deliberations after deadlock, trial court erred in denying a motion under Cal. Penal Code
13 § 1538.5, and illegal sentencing enhancement pursuant to Cal. Penal Code § 12022.5.
14 On April 29, 1993, the Magistrate Judge recommended denial of the petition on the
15 merits with prejudice as a successive petition and abuse of the writ. On May 18, 1993,
16 Petitioner filed objections to the report and recommendation.

17 On June 9, 1993, the Court issued an Order Adopting Report and
18 Recommendation of United States Magistrate Judge and entered Judgment denying the
19 petition in Lewis II on the merits and with prejudice. On June 22, 1993, Petitioner filed a
20 Notice of Appeal. This Court denied Petitioner's request for a certificate of probable
21 cause on August 11, 1993. On October 8, 1993, the Ninth Circuit denied Petitioner's
22 request for a certificate of probable cause. (Case No. 93-56347).

23 II.

24 DISCUSSION

25 The Petition was filed after enactment of the Antiterrorism and Effective Death
26 Penalty Act of 1996 ("AEDPA"). Therefore, the Court applies the AEDPA in reviewing
27 the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481
28 (1997).

1 The AEDPA provides, in pertinent part, that: "Before a second or successive
2 application permitted by this section is filed in the district court, the applicant shall move
3 in the appropriate court of appeals for an order authorizing the district court to consider
4 the application." 28 U.S.C. § 2244(b)(3)(A). A district court does not have jurisdiction to
5 consider a "second or successive" petition absent authorization from the Ninth Circuit.
6 *Burton v. Stewart*, 549 U.S. 147, 127 S. Ct. 793, 796, 799, 166 L. Ed. 2d 628 (2007);
7 *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) ("When the AEDPA is in play,
8 the district court may not, in the absence of proper authorization from the court of
9 appeals, consider a second or successive habeas petition.") (citation omitted).

10 Here, the Petition is a third or successive petition that challenges the same
11 custody imposed by the same judgment of the state court as in *Lewis I* and *Lewis II*.
12 (Petition at 2, 5-6.) It plainly appears from the face of the Petition that Petitioner has not
13 received authorization from the Ninth Circuit Court of Appeals to file this Petition. This
14 Court must, therefore, dismiss the Petition as a successive petition for which it lacks
15 jurisdiction under 28 U.S.C. § 2244(b)(3). See *Burton*, 127 S. Ct. at 796-98.

16 Rule 4 of the Rules Governing Section 2254 Cases in the United States Courts
17 provides that "[i]f it plainly appears from the face of the petition and any attached
18 exhibits that the petitioner is not entitled to relief in the district court, the judge must
19 dismiss the petition and direct the clerk to notify the petitioner." Here, summary
20 dismissal is warranted.

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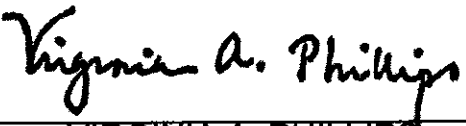
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ORDER

IT IS HEREBY ORDERED that Judgment be entered summarily dismissing the habeas petition and action for lack of subject matter jurisdiction.

Date: November 18, 2008



VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

Presented By:



ALICIA G. ROSENBERG
UNITED STATES MAGISTRATE JUDGE